CHUNG KHIAW BANK LTD.

v.

TIO CHEE HING

SUPREME COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 256 OF 1985]
2 MAY 1987

CIVIL PROCEDURE: *Application in High Court O. 18 r. 19 of the rules of the High Court 1980 and under the Court's inherent jurisdiction - To strike out amended writ and statement of claim - On grounds that it disclosed no reasonable cause of action or that it was vexatious and an abuse of the process of the Court - Also that the matter was time-barred - Application dismissed - Appeal - History of the whole matter - Whether the appellate Court is placed at any disadvantage in drawing its own inferences - Whether the learned Judge had erred.*

By summons-in-chambers dated 8 January 1985 the appellants applied under O. 18 r. 19 of the Rules of the High Court 1980 and under the Court's inherent jurisdiction to strike out the respondent's (plaintiff's) writ and statement of claim dated 27 August 1982 as amended on 26 October 1984, on the grounds that it either disclosed no reasonable cause of action or alternatively that it was vexatious and an abuse of the process of the Court, and the matter relied on was time-barred having occurred more than 3 years before the issue of the writ.

The learned Judge declined to grant the application, holding that there were triable issues and undue influence to go to trial, and that the matter was far from plain and obvious.

On appeal to the Supreme Court, the appellants contended that the learned Judge had failed to look into the whole history of this matter, pointing out that this was the fifth time this very matter was coming up on appeal, and that O. 18 r. 19(b) - that the writ was scandalous, frivolous and vexatious-and that r. 19(d) - that it is otherwise an abuse of the process of the Court had indeed been made out in the Court below. The appellants also reiterated that the suit is time-barred, having been brought more than 3 years too late.

Held:

[1] The learned trial Judge did consider at some length the history of this whole matter, though unfortunately it was examined through the eyes as it were of the respondent Tio, being confined to facts referred to his statement of claim.

[2] The Appellate Court is at no disadvantage in drawing its own inferences as it would otherwise have been if it had been dealing with findings of facts arising from *viva voce* testimony before the learned trial Judge. In addition their Lordships had the added advantage that they could review the history as seen not merely through the eyes of the respondent Tio, but also take into account a lot of other matters which Tio himself could hardly dispute.

[3] The learned Judge had erred in not holding that his suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the Court.

[4] On the issue of limitation, the respondent should also fail, the matter on which he relied of having occurred more than 3 years before the issue of the writ.

[Appeal allowed with costs here and below.]

Cases referred to:
Re Vernazza [1959] 2 All ER 200
Tractors Malaysia Berhad v. Tio Chee Hing [1975] 2 MLJ 1

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 51(1)

Other sources referred to:
Halsbury's Laws of England, Vol. 22, para. 1669 & 1670

For the appellants - Mr. Alex Khoo (Mr. David Wong with him); M/s. Peter Lo & Co.
For the respondent - N. Chandran (Abdul Razak Rouse with him); M/s. Rayner & Co.

JUDGMENT

Wan Suleiman SCJ:

By summons-in-chambers dated 8 January 1985 the appellants in this appeal applied under O. 18 r. 19 of the Rules of the High Court 1980 and under the Court's inherent jurisdiction to strike out respondent/plaintiff's writ and statement of claim dated 27 August 1982 as amended on 26 October 1984, on the grounds that it either disclosed no reasonable cause of action or alternatively that it was vexatious and an abuse of the process of the Court, and the matter relied on was time-barred having occurred more than 3 years before the issue of the writ.

Learned Judge declined to grant the application, holding that there were triable issues and undue influence to go to trial, and that the matter was far from plain and obvious.

Before us learned Counsel for the appellants, dealing with the first four grounds of the memorandum of appeal, submitted that the learned Judge had failed to look into the whole history of this matter, pointing out that this is the fifth time this very matter is coming up on appeal, and that O. 18 r. 19(b) i.e., that the writ was scandalous, frivolous and vexatious, and (d) i.e. it is otherwise an abuse of the process of the Court, had indeed been made out in the Court below. In addition, Counsel also reiterated that (this refers to ground 6) the suit is time-barred, having been brought more than 3 years too late.

Let us examine what the learned trial Judge had to say about the background of this matter in his judgment. The respondent, he noted, is or was the owner of the land which he referred to as the "subject land" enumerated in para. 1 of the statement of claim, i.e. Lahat Datu Lease Nos. 10780, 10793, 10975, 10976, 10800, 10801, 10806, 10784, 10785, 10792 and 30809. Of these, land held under Lease Nos. 10784, 10785, 10792 and 30809 had been subdivided into 81 subdivided titles. Some time prior to 1968 the respondent (Tio), his Lordship notes, charged the said land to the Lahat Datu branch of appellants' bank for RM300,000 excluding interest and other charges for facilities extended to Southern Estate Sdn. Bhd. with which he was associated. In 1968, Tio was developing Lahat Datu township through a company called Southern Development Sdn. Bhd. (the company). The company being in need of money, Tio alleged that the appellant bank agreed to provide RM1.4 million to him and or his company and such loan to be secured by a charge to be created on the land. Tio executed the charge on 9 August 1968 (the first charge). He complains that the contents of the charge was never

explained to him. One should bear in mind his claim that he does not know much English. The appellants' manager then said that the first charge was not acceptable and that he wanted a separate charge to clear off the existing charge in their favour. Accordingly, on 10 August 1968 Tio executed another charge (second charge) again prepared by appellants' solicitors, and identical in terms with the first charge apart from the amount, which was RM400,000, the property charged being Tio's coconut estate held under CL 173397.

Appellants registered the first charge on 14 August 1968 (Memorial No. 92666) and the second charge on 13 August 1968. Tio complains that the appellants had fraudulently obtained the first charge. In para. 9 and 10 of his statement of claim he set out the particulars of his charge of fraud alleging that the appellants had no intention of providing money under that charge, no account was opened for it and no money was paid under it. Appellants had, he added, consistently refused to provide evidence of money allegedly provided under the first charge, and had tricked him into executing the two charges and the appellants had made dishonest use of the first charge and purported to realise it even though no loan had been made under it.

His Lordship noted that para. 11 of the statement of claim alleged that appellants took unfair advantage of Tio's financial difficulties in executing the first and second charge and struck an unconscionable bargain. Tio maintained that whilst appellants had independent legal advice he did not have any. In para. 12 respondent asserted that the appellants had exerted undue influence over him in the transactions mentioned. He therefore claimed that the charge was never valid and ought to be cancelled. In para. 14 Tio added that in Land Enquiry No. 3 of 1980, appellants applied for and obtained an order for sale and proceeded to sell by public auction the property towards recovering repayment of the fictitious loan, adding that he would suffer irreparable damage if the sale was allowed to proceed. In para. 16 of the statement of claim Tio alleged that he first knew of the fraud at the end of 1980 and on 12 February 1982 he lodged a police report at Sandakan, and had made several unsuccessful attempts himself and through his solicitors for further particulars about the alleged loan. He therefore prayed for an order for delivery and cancellation of charge 92666, the first charge, and an injunction restraining the appellants from proceeding with the sales of the property, as well as an order to set aside the orders of the Collector in Land Enquiry Nos. 3, 4 and 5 of 1980.

Coming back to submissions by Counsel for the appellants, we were referred to the English decision in *Re Vernazza* [1959] 2 All ER 200 the facts of which are as follows:

In 1935 V. sued a company for £158,982 for breach of contract and/or wrongful dismissal. The action was dismissed in 1937. In 1938 V. brought an action in the Chancery division, claiming that the judgment in the earlier action should be set aside: in this action the statement of claim was struck out as vexatious. In 1938, 1939, 1940, 1952, 1953, 1957, 1958 and 1959 he took further proceedings or steps in proceeding before the Courts arising out of the same claim as had been the subject of action: all these were dismissed or refused. On a motion for an order under s. 51(1) of the Supreme Court of Judicature (Consolidation) Act 1925, that no legal proceedings should be instituted by V. without the leave of the High Court or a Judge thereof, it was contended on V.'s behalf that as the process issued disclosed a cause of action, except in the second action where the statement of claim was struck out, the proceedings were not vexatious.

It was held that in determining whether proceedings were vexatious the Court must look at the whole history of the matter, not solely at the question whether the pleadings had disclosed a cause of action.

Another authority cited to support the same proposition is the Privy Council decision in *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ 1. The appellants there had obtained a consent judgment against the respondent. Respondent applied in the same action to have the judgment set aside but the application was dismissed. Subsequently respondent brought an action to set aside the consent judgment in the former action. The learned trial Judge set aside the proceedings on the ground that the action was frivolous and vexatious and brought to defeat the course of justice in the hope of delaying the execution of the judgment. On appeal to the Federal Court , it was held that the respondent's statement of claim raised triable issues which were *prima facie* sustainable. The Federal Court regarded themselves as precluded from examining the evidence for the purpose of determining whether it was a clear inference from the facts in evidence which were undisputed, that the action was bound to fail. They therefore allowed the appeal so that the action should be allowed to proceed to trial.

The Privy Council held that in not submitting the evidence to critical examination, the Federal Court was in error. Had they done so, they would have come to the same conclusion as the High Court Judge that the action was brought to defeat the course of justice in the hope of delaying the execution of the judgment in the earlier action.

The respondent bank were the plaintiffs in Civil Suits Nos. 181 and 182 of 1969 and Tio the defendant, on this very same subject matter as the instant appeal. The bank obtained judgment in both suits and an order of execution had been made against Tio. His appeal against the order of execution was dismissed.

Tio then filed Civil Suit No. 1520 of 1979 at the High Court in Kota Kinabalu alleging that the present respondent was in breach of an agreement and prayed for an order that the judgment entered against him (Tio) in the two civil suits aforementioned be set aside and all execution proceedings be stayed until the trial of Civil Suit No. 1520 of 1979.

Soon after entering appearance respondents applied by way of summons-in-chambers to have part of the indorsement of claim struck out. Those parts the bank sought to strike out were:

(a) for an order that the judgment entered against the plaintiff (Tio) by the defendant (the bank) in C.S. No. 181/69 and 182/69 be set aside; and

(b) that all execution proceedings so instituted or to be instituted in the future in C.S. No. 181/69 and 182/69 be stayed until the suit be tried.

The learned trial Judge (Haji Wan Mohamed J) noted that Tio had in fact tried on many occasions to stop the respondent bank from proceeding with the order of execution and had invariably failed for lack of merit in each and every application. The Judge therefore held that the indorsements earlier mentioned were frivolous and vexatious and otherwise an abuse of the process of the Court, and accordingly ordered them to be struck out.

Also in the same judgment the Judge considered Tio's application to reamend the amended statement of claim to include an allegation of fraud.

He noted that on 5 February 1980 Counsel for the defendants (the present respondent) had filed a written submission, a copy of which was provided to Tio on 6 February 1980, and the relevant part of which is a citation from *Halsbury's Laws of England*, Vol. 22, para. 1669 and 1670 which says that no final judgment may be set aside in an action except in an action for fraud on fresh evidence which would have material effect upon the decision of the Court. After that submission had been made Tio sought leave to reamend his amended statement of claim to include fraud. The learned Judge found that this prayer to reamend was not made

bona fide, remarking that since the judgment in the two earlier cases had been made in 1970 it was most improbable that Tio had over ten years later just come to realise that these judgments had been obtained fraudulently. He therefore dismissed the application to reamend the amended statement of claim.

In the instant suit under appeal, C.S.S. 1170 of 1982, the learned trial Judge did consider at some length the history of this whole matter, though unfortunately it was examined through the eyes as it were of Tio, being confined to facts referred to in his statement of claim. We need not set out in detail the facts so considered except to say they are set out in pp. 184 to 190 of the record.

Therefore the Appellate Court is placed at no disadvantage in drawing its own inferences as it would otherwise have been if it had been dealing with findings of facts arising from *viva voce* testimony before the learned trial Judge. In addition this Court has the added advantage that it could review the history as seen not merely through the eyes of Tio, but also take into account a lot of other matters which Tio himself can hardly dispute.

Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned Judge had erred in not holding that this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the Court.

In the result this appeal on those counts alone should be allowed with costs here and below.

It also follows that on the issue of limitation, the respondent should also fail, the matter on which he relied of having occurred more than 3 years before the issue of the writ.

Also found at [1987] 1 CLJ 531